No. 91-1496

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER C. REITER and CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE INTERNATIONAL MASS RETAIL ASSOCIATION, THE RUBBER MANUFACTURERS ASSOCIATION, THE TRANSPORTATION BROKERS CONFERENCE OF AMERICA, AND THE TRANSPORTATION CLAIMS AND PREVENTION COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether, in an action by an insolvent carrier to collect a filed rate which is more than the rate the carrier charged and collected, the trial court should stay its proceedings and refer to the Interstate Commerce Commission the question whether the filed rate was "reasonable" within the meaning of the Interstate Commerce Act, 49 U.S.C. § 10701(a).

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are seven national organizations of shippers and transportation brokers.[1] The issue presented by the holding below is of great importance to the thousands of shippers of all sizes and to the hundreds of

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[1] *See* Appendix for a brief description of each *amicus*.

transportation brokers represented by *amici* who have been sued, or who may be sued, by carriers seeking to collect transportation rates substantially higher than the charges that were fairly negotiated and paid for years ago. Because of the importance of this problem to *amici*, they wish to present their views to assist the Court properly to resolve the issue presented.[2]

STATEMENT

Amici adopt the statement of the case presented in the opinion of the court of appeals (Pet. App. 2a-5a), but offer the following description of the regulatory and business environments out of which this case arises to assist the Court in evaluating the legal issue presented.

1. *Regulatory Environment.* From 1935, when the Interstate Commerce Act ("ICA") was amended to cover motor carriers, until 1980, the motor carrier industry, like the railroad industry, was closely regulated. The Interstate Commerce Commission strictly regulated entry into the industry, the growth of carrier firms, the routes carriers serviced and the cargo they moved. Most critically, the ICC regulated rates, which were set primarily through collective action by carrier rate bureaus, to ensure that they were "reasonable" and "nondiscriminatory" within the meaning of the ICA, 49 U.S.C. § 10701(a). See generally, *Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures* (*"Ratemaking and Related Practices"*), 7 I.C.C.2d 388, 393 (1991).

Twelve years ago, in an effort to promote competition in the transportation sector, Congress amended the ICA by enacting the Motor Carrier Act of 1980. See Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified at scattered sections of 49 U.S.C.). These amendments partially deregulated the carrier industry. Among other changes, Congress substantially relaxed the

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing ~~of this~~ brief. The parties' letters of consent will be filed with the Clerk of the Court.

rules governing entry into the carrier market, 49 U.S.C. § 10922(b), dropped certain route and cargo restrictions, *id.* at § 10922(h), and limited collective ratemaking, *id.* at § 10706(b). Congress also restricted the Commission's authority to investigate and suspend on its own initiative proposed rate changes that fell within statutorily defined "zones of ratemaking freedom." *Id.* at § 10708(d).[3]

While modifying the industry's regulatory structure substantially, Congress in 1980 declined to deregulate the industry entirely. Most significantly, it retained the bedrock requirements of the ICA that common carriers must charge "reasonable" rates, 49 U.S.C. § 10701(a), and that common carriers must file all rates with the ICC, *id.* at § 10761(a). In addition, Congress did not interfere with the ICC's broad authority to determine rate reasonableness, 49 U.S.C. § 10701(a), nor with shippers' statutory right to hold carriers liable for damages resulting from the imposition of rates that the ICC finds to be unreasonable, 49 U.S.C. §§ 11705(b)(3), 11706(c)(2).

2. *Business Environment.* Following the adoption of the Motor Carrier Act, a substantial number of new carriers entered the transportation marketplace. Indeed,

[3] Before 1979, the Commission reviewed all tariff filings prior to the time they became effective. Since that date, the Commission has reviewed only a random sampling of filed tariffs. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 360 n.4 (1984). Accordingly, the Commission can no longer assume that filed tariffs are reasonable.

In addition to the other changes, Congress substantially relaxed the rules governing "contract" carriage, principally by permitting carriers simultaneously to act as both common and contract carriers. "Contract" carriers—like most other merchants—are permitted to enter into entirely private contractual arrangements with shippers. In 1983 the ICC, pursuant to authority delegated to it by Congress, exempted contract carriers from the requirement that they file rates. *See Exemption of Contract Carriers From Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd sub nom. Central & S. Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 314 (D.C. Cir. 1985). By 1991, approximately 75% of all common carriers were authorized to offer contract carriage. ICC Office of Economics, *The U.S. Motor Carrier Industry Long After Deregulation* 72 (1992).

the number of carriers regulated by the ICC more than doubled between 1980 and 1991, increasing from less than 20,000 to nearly 48,000. ICC Office of Economics, *The U.S. Motor Carrier Industry Long After Deregulation* ("*Long After Deregulation*") 72 (1992).

Notwithstanding this increased competition, most carriers, acting collectively through rate bureaus, have continued to file general rate *increases* on at least an annual basis since 1980, *Ratemaking and Related Practices*, 7 I.C.C.2d at 489-97, and thus tariff class rates have increased substantially since that time. This paradoxical practice makes economic sense only in light of the carriers' practice of discounting their rates to attract business. Because of competition within the industry, most carriers, fully aware that the class rates will not move any traffic, charge rates substantially below the class rates. *Id.* at 410-20.[4] Overall, in 1990 the average discount off the class rates was approximately 40%, *id.* at 450, and in those sectors of the industry where competition is most intense, price discounts range as high as 78%, *id.* at 413. Many carriers also offer discounts in the form of service benefits. *Id.* at 418.

The ICC has held that different discounts from class rates for individual customers are not per se discriminatory. *Regular Common Carrier Conference-Petition For Declaratory Order-Range Of Discount And Customer Account Codes*, 8 I.C.C.2d 47 (1991). Indeed, in recent years the Commission has taken steps to foster discounting and competitive pricing, for example, by permitting individual filed rates to take effect within 24 hours. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146,

[4] By filing for higher class rates and simultaneously offering discounts off those rates, carriers were able progressively to increase their rates while representing to their customers that they are receiving discounted rates. For example, one typical regional rate bureau filed rate class increases totaling 45% between 1985 and 1991, and average discounts increased by 23% during this period. *Ratemaking and Related Practices*, 7 I.C.C.2d at 489 (Addendum E).

150-52 (1984). Despite this lenient rule, many carriers —including respondent Carolina Motor Express ("CME") and plaintiffs in similar undercharge actions—misfiled or failed to file with the Commission many of the discount rates they negotiated with shippers.

The heightened competition among carriers has made the industry substantially more efficient. The ICC's Office of Economics reports that competition has led to improved service and reliability and, most important, lower transportation costs. See *Long After Deregulation* at 6. Substantial evidence suggests that lower transportation costs have been passed on to consumers in the form of lower product prices. *Id.* at 9-13. And overall, the Department of Transportation has estimated that the competitive changes in this industry have saved the U.S. economy more than $10 billion annually since 1980. *Id.* at 6.

3. *The Nature of the Problem.* As is almost invariably true after deregulation, more efficient carriers have grown in the post-Motor Carrier Act environment. Many other carriers, however, including respondent CME, were unable to survive and have filed for bankruptcy. Rate auditors retained by the bankruptcy trustees for these companies, upon learning of the discrepancies between the filed rates and the rates actually billed and accepted by these insolvent carriers, have sought to collect the differences between the filed rates and the actual charges from the carriers' former customers. The auditors' efforts have taken the form of "dunning" letters, which demand payment of the higher tariff rates for services rendered years ago, and which are followed closely by suits alleging undercharges. See generally McGinley & Machalaba, *Fight Over Freight: Failed Trucking Firms Are Trying to Recoup Discounts They Gave*, Wall St. J., June 16, 1992, at A1; Phillips, *Law Lets Trucking Firms Raise Rates Retroactively*, Washington Post, June 16, 1992, at C1, C6.

In many instances, *i.e.*, where tariffs contain a set of class rates and various discounts based on the type and volume of traffic, even the applicable rate under the

tariff cannot be ascertained readily. In that situation, "[a] rebilling [by the trustee] is a unilateral declaration by the [trustee] that the rate originally charged for the shipment was unlawfully applied, and that a higher rate (most frequently the highest rate on file) should have been applied." ICC Ex parte No. MC-208, *Nonoperating Motor Carriers—Collection of Undercharges* ("*Nonoperating Motor Carriers*"), slip op. at 2 (June 1, 1992).

The magnitude of this "rebilling" practice is extraordinary. The ICC estimates that hundreds of thousands of shippers have been targeted by bankruptcy trustees and their auditors. *Id.* These targets run the gamut from large shippers—many of whom have been dunned for millions of dollars—to small companies—some of whom allegedly owe no more than several hundred dollars. *Id.* In one case alone, now-defunct Transcon Lines of Los Angeles has sued approximately 350,000 former customers seeking hundreds of millions of dollars in "undercharge" payments. McGinley & Machalaba, *supra*, at 1.

The financial stakes in this "rebilling" practice are therefore staggering. Some shippers, particularly small companies, may themselves be forced into bankruptcy if they are required to pay the full tariff rates. *Id.* Overall, the ICC estimates that shippers may be exposed to claims for as much as $27 billion, plus another $5 billion in prejudgment interest. *Nonoperating Motor Carriers* at 2.

SUMMARY OF ARGUMENT

In *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), this Court held that the ICC could not generally prohibit an insolvent carrier from attempting to collect a filed rate after it had negotiated a lower rate with a shipper but failed to file that rate with the ICC. The Court indicated, however, that a shipper could defend against such an effort on the ground that the filed rate was statutorily "unreasonable," and indicated that the district court should consider that issue on remand. *Id.* at 2767 & n.10.

The Court did not, however, decide the precise issue raised by this case: whether the trial court adjudicating such a dispute should stay its proceedings and refer the issue of reasonableness to the ICC, or whether the court should require the shipper to pay the filed rate and then seek to recover the difference in a separate, sequential civil action in which the reasonableness issue would be referred to the ICC. In *amici's* view, the former course is plainly required by the ICA and the doctrine of primary jurisdiction, by the holdings of this Court, and by sound public policy considerations that are embodied in the Act. Moreover, no rule of bankruptcy law requires a different result.

A.

1. The ICA, in its central provision, requires that motor common carriers must charge "reasonable" rates. 49 U.S.C. § 10701(a). The ICA also requires such carriers to file rates in public tariffs with the ICC and to charge and collect only the filed rates. *Id.* at § 10762(a). These two provisions are integrally related: Because a filed rate is not "lawful" if it is not "reasonable," *Arizona Grocery Co.* v. *Atchison, T. & S. F. R.R.*, 284 U.S. 370, 384 (1932), "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767. Accordingly, a shipper must be entitled to defend against a claim by a carrier for money in excess of the amount charged and accepted on the ground that the filed rate is unreasonable.

2. The argument that shippers are entitled to raise rate reasonableness as a defense in undercharge actions is independently supported by the "primary jurisdiction" doctrine. Under the terms of this doctrine, the ICC is vested with authority to determine whether filed rates are "reasonable" when that issue is properly raised. In addition, this doctrine "transfers from court to agency" law-making power with respect to rates. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 65 (1956). Accordingly, this doctrine prohibits the courts from usurping the ICC's authority over rates by depriving the Commission of a

meaningful opportunity to exercise its authority—*i.e.*, an opportunity to exercise its authority at a time when it will have a practical effect. In this case, an ICC determination that the filed rates were not "reasonable" would have no practical effect if rendered after petitioners have paid the filed rate because respondent CME is insolvent.

B.

Immediate referral to the ICC is also required by this Court's decisions construing the ICA. This Court has made plain that carriers have no legal right to collect rates that are unreasonable. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960). Accordingly, where carriers sue for undercharges, they should not automatically be entitled to collect the filed rate. Instead, shippers should be permitted to raise the unreasonableness of the filed rates as a *defense*, and the issue should be referred to the ICC.

While this outcome appears to follow inexorably from the language of the statute and the primary jurisdiction doctrine, this Court has suggested, without holding, that under some limited circumstances the shipper should pay first and collect later. *See Arizona Grocery*, 284 U.S. at 384; *Pennsylvania R.R.* v. *International Coal*, 230 U.S. 184, 197 (1913). More than 35 years ago, however, in *Western Pacific*, *supra*, this Court made clear that where a shipper does *not* have complete assurance of being made whole after a separate reparations action before the ICC, the question of reasonableness *must* be referred to the ICC at the outset. Because respondent CME is insolvent, petitioners will not be made whole after a separate reparations action. Thus, *Western Pacific* requires the district court to stay respondents' undercharge action and refer the question of whether the filed rates were "reasonable" to the ICC.

Referral in this case is also supported by this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984), in which this Court held that the ICC has discretionary power to fashion a remedy beyond its express authority if the remedy directly and closely furthers a specific statutory mandate. In this case, the ICC has determined that shippers must have an opportunity to challenge the reasonableness of rates at a time when a determination by the Commission will have some practical import. This remedy clearly furthers a statutory mandate—indeed, the *core* statutory mandate of rate reasonableness—and is unquestionably directly and closely tied to that mandate.

C.

The rule requiring direct referral to the ICC is also supported by considerations of public policy embodied in the ICA, particularly the policy favoring rate reasonableness. In contrast, the pay-first requirement adopted by the court of appeals elevates the filed rate requirement to an unwarranted position of superiority over the reasonableness requirement. Indeed, by ignoring the fact that a judgment favoring a shipper in a reparations action would, as a practical matter, be unenforceable, the holding below entirely guts the statutory requirements that rates must be "reasonable."

Moreover, the pay-first requirement would create a perverse incentive for carriers *not* to file rates. Under this requirement, if a carrier fails to file its rates, it can, as in this case, seek higher rates in a subsequent action. If it loses, it is no worse off than if it had filed in the first place; if it wins—or if it induces shippers to settle—it can receive rates far higher than those at which it otherwise could have transported the goods.

D.

No specific provision of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, governs this case. Nevertheless, contrary to the suggestion of the court of appeals, the Bankruptcy Code fully supports the rule that an unreasonableness defense must be adjudicated in the same proceeding as an undercharge claim. First, it is axiomatic that the bankruptcy laws must not be interpreted to permit "creat[ion of] a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). In this case, respondent CME will

obtain precisely the sort of "windfall" that the Code forbids if the pay-first procedure is followed because it will never be required to repay the difference between the filed rate and the negotiated rate if the ICC finds the filed rate to be unreasonable.

Second, under the Code and common law principles of bankruptcy pre-dating the Code, even an entity that is both a debtor and a creditor of the bankruptcy estate is not required to pay first and collect later. 11 U.S.C. § 553. Such an entity is, instead, entitled to set off the debt it owes against the debt it is owed or to recoup any amount it is owed. By parity of reasoning, petitioners should be permitted to have the reasonableness of the filed rates determined before they must pay any additional monies to respondents.

ARGUMENT

The requirement that the rates carriers charge for shipping goods must be "reasonable" is the cornerstone of the Interstate Commerce Act. At bottom, this case raises the question of whether, in some circumstances, this core requirement can be circumvented.

Two years ago, in *Maislin Indus., U.S., Inc.* v. *Primary Steel Inc.*, 110 S. Ct. 2759 (1990), this Court held that the ICA's prohibition against "unreasonable practices" could not generally be applied to bar a bankrupt carrier from attempting to collect a filed rate after it had negotiated a lower rate with a shipper but failed to file that rate with the ICC. This Court held that the ICC's policy prohibiting this practice "directly conflict[ed]" with the filed rate requirement of the ICA, which requires, *inter alia*, that carriers both charge and receive the filed rate. *Id.* at 2770.

While rejecting the ICC's contention that a carrier's attempt to collect a filed rate after it had negotiated a lower rate constituted a statutorily prohibited "unreasonable practice," this Court reaffirmed the central role of the ICC as regulator of the motor carrier industry. The Court made clear that, despite generalized Congressional

"exhortations" in the Motor Carrier Act of 1980 to the contrary, the motor carrier industry remained a regulated industry in which rates must be filed, *id.* at 2770, and that the ICC retained the power and exclusive responsibility to determine the reasonableness of those rates, *id.* at 2767.

In so holding, the Court emphasized, as it has on many other occasions, that filed rates are not *lawful* rates if they are not "reasonable." 110 S. Ct. at 2767. Thus, the Court indicated that a shipper could defeat a carrier's efforts to collect a filed rate if the ICC determined that rate to be "unreasonable" within the meaning of 49 U.S.C. § 10701(a). *Id.* Accordingly, the Court held that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." *Id.* at 2767 n.10.

Although the Court suggested that immediate referral to the ICC was appropriate, the Court did not directly decide the question presented by this case: whether a shipper may defend against a claim for additional payment on the ground that the filed rate was unreasonable and have the merits of that defense referred to the ICC, or whether the shipper must pay the tariff rate and then seek to recover the difference in a separate, sequential civil action. As *amici* demonstrate below, the former course is plainly required by the ICA and its doctrine of primary jurisdiction, by the holdings of this Court, and by sound principles of policy embodied in the purposes of the ICA.

I. IN AN UNDERCHARGE ACTION BY AN INSOLVENT CARRIER, A COURT MUST REFER THE QUESTION WHETHER THE FILED RATE WAS REASONABLE TO THE ICC PRIOR TO ENTERING JUDGMENT AGAINST THE SHIPPER.

A. Both The Interstate Commerce Act And The Doctrine Of Primary Jurisdiction Require That Shippers Be Permitted To Raise The Defense That The Filed Rates Are Unreasonable In An Action By A Carrier To Collect Additional Fees, Particularly If The Carrier Is Insolvent.

The central requirement of the ICA is that shipping rates must be "reasonable." The primary jurisdiction doc-

trine vests principal law-making authority with respect to rates in the ICC. Properly analyzed, both the ICA's reasonableness requirement and the primary jurisdiction doctrine require that shippers be afforded an opportunity to raise the reasonableness of the filed rates as a defense in an action by a carrier to collect additional fees, particularly in those cases in which the prosecuting carrier is insolvent.

1. The ICA imposes a requirement on motor common carriers that they charge "reasonable" rates. Specifically, Section 10701 provides that "[a] rate . . . related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable." 49 U.S.C. § 10701(a). This provision codifies the longstanding common-law duty of carriers to charge no more than a "reasonable" rate. See *Arizona Grocery*, 284 U.S. at 384.

The ICA also requires motor common carriers to file rates in public tariffs with the ICC and to charge and collect only the filed rates. Specifically, Section 10761 of the Act provides, in pertinent part:

> [e]xcept as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff . . . .

49 U.S.C. § 10761(a). This requirement was designed principally to prevent *carriers* from engaging in unlawful rate discrimination—*i.e.*, favoring some shippers over others—by granting unpublished rebates or other preferences. *Maislin*, 110 S. Ct. at 2766; *Southern Pac. Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 344 (1982); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906). This requirement also helps carriers maintain a steady and predictable cash flow; so long as carriers file their rates and insist upon receiving those rates at the

time of shipment, they can be assured of receiving the filed rates for their services. *Louden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939).

The Court has long recognized that the ICA's requirements that rates must be "reasonable" and that carriers must charge (and shippers pay) filed rates are complementary *affirmative* obligations of the statute. In the classic description of the relationship between these provisions, this Court stated that "[s]hippers . . . as well as carrier[s] must abide by [the filed rate], *unless it is found by the Commission to be unreasonable.*" *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added).

Most recently, in describing the relationship between these two statutory requirements, the Court in *Maislin* expressly recognized that a shipper's claim in an undercharge action that the filed rates were not "reasonable" is not simply an equitable defense of the type that this Court has long prohibited in undercharge actions.[5] The requirement that a shipper should pay no more than a "reasonable" rate is, rather, a matter of such fundamental importance under the statutory scheme that the filed rate requirement must be applied to accommodate it.

Indeed, the Court in *Maislin* stated unequivocally that "the filed rate *is not enforceable* if the ICC finds the rate to be unreasonable." 110 S. Ct. at 2767 (emphasis added). Citing a distinction it first drew in *Arizona Grocery*, the Court explained that an unreasonable rate is unenforceable because, "although the filed rate is the *legal* rate, . . . 'the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable.'" *Id.* (quoting *Arizona Grocery*, 284 U.S. at 384). The Court further explained that the "filed rate doctrine," properly under-

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[5] *See, e.g., Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915) ("*Ignorance or misquotation* of rates is not an excuse for paying or charging either less or more than the rate filed") (emphasis added); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906) (*ignorance* of filed rate no defense) (emphasis added).

stood, is not concerned exclusively with filed rates, but rather "follows from the requirement that only filed rates be collected, . . . the requirement that rates not be discriminatory, . . . *and the requirement of § 10701 that carriers adopt reasonable rates* . . . ." *Id.* at 2767 (emphasis added). See also *id.* at 2772 (Scalia, J., concurring) ("§§ 10701(a) [the reasonableness requirement] and 10761(a) [the filed rate requirement] *need* to be reconciled by assuming an implicit but unexpressed exception to the filed-rate requirement") (emphasis in original); *id.* at 2773 (Stevens, J., dissenting) ("[f]rom the beginning . . . the Court construed [the] command [of § 10761(a)] as subject to the unstated exception that a filed rate would not be enforced if the Interstate Commerce Commission . . . determined that the rates were 'unreasonable' ").

In short, this Court has made clear that a shipper's claim in an undercharge action that the filed rates are not "reasonable" is not a prohibited "equitable" defense; instead, the reasonableness requirement is an "exception" to the filed rate requirement; and, most critically, the filed rate is lawful only if it is "reasonable." Accordingly, where, as here, a shipper is sued for the filed rate by a carrier that has billed, collected, and been satisfied by a lower rate, it follows that the shipper must be entitled, under the terms of the ICA itself, to defend against the carrier's claim for additional money on the ground that the filed rate was not "reasonable."[6] And, under the terms of the primary jurisdiction doctrine, see *infra* pp. 14-17, the question whether the filed rates are "reasonable" must be referred to the ICC.

2. Under the ICA, primary jurisdiction to determine whether filed rates are "reasonable" within the meaning

[6] Under the ICA, a shipper may not insist upon delivery without paying for the carrier's services. 49 U.S.C. § 10743(a). Thus, this case, like all undercharge cases, involves shippers that paid the rate billed; it does not involve a shipper seeking to ship goods but avoid payment on the ground that the rate quoted by the carrier is "unreasonable."

of the statute is vested in the ICC.[7] This jurisdiction was historically justified on the ground that the Commission must determine rates to further the statutory goal of uniformity and to prevent other abuses by carriers. See *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907). It is now recognized that the ICC must have primary jurisdiction to determine rates because it possesses certain "expert and specialized knowledge." *Western Pacific*, 352 U.S. at 64. The Commission is "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to determine the reasonableness of rates. *Far East Conference* v. *United States*, 342 U.S. 570, 575 (1952).[8]

Because primary jurisdiction to determine rates is vested in the ICC, the question whether the filed rates are reasonable must be referred to the ICC when the rate reasonableness defense is properly raised by a shipper in an undercharge action. As this Court has explained, "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, [the primary jurisdiction doctrine requires that] agencies created by Congress for regulating the subject matter *should not be passed over.*" *Id.* at 574 (emphasis added).

The primary jurisdiction doctrine, however, does not simply dictate that the ICC, rather than the courts, must determine whether rates are reasonable when that issue

[7] The ICA "altered the common law by lodging in the Commission [this] power [which was] theretofore exercised by the courts. . . ." *Arizona Grocery Co.* v. *Atchison, T. & S.F. R.R.*, 284 U.S. 370, 384 (1932); *also Burlington N., Inc.* v. *United States*, 459 U.S. 131, 141 (1982).

[8] Such a determination "is reached ordinarily upon voluminous and conflicting evidence, . . . [and an] adequate appreciation of . . . many intricate facts of transportation is indispensable." *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). Moreover, the standards under which the ICC determines "reasonableness" are highly technical. *See, e.g.*, 49 U.S.C. §§ 10704(b)(2)(A), 10704(b)(3); *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991).

is properly raised. In fact, this doctrine provides independent support for the more basic proposition that shippers must be permitted to raise the rate reasonableness defense in undercharge actions, particularly where the carrier is insolvent.

This doctrine, according to this Court, "does 'more than prescribe the mere procedural time table of the lawsuit. It allocat[es] the law-making power over certain aspects' of commercial relations. 'It transfers from court to agency the power to determine' some of the incidents of such relations." *Western Pacific*, 352 U.S. at 65 (citing Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 583-84 (1954)). More specifically, in the motor carrier context, this doctrine transfers from the courts to the ICC principal law-making authority with respect to rates.

Accordingly, under the terms of this doctrine, the courts may not deprive the ICC of a meaningful opportunity to determine whether rates are "reasonable." The courts may not, in other words, deprive the ICC of the opportunity to determine reasonableness at a time when this determination will be of some practical significance. To do so would effectively usurp the "law-making power over certain aspects" of the carrier-shipper relationship which has been allocated to the Commission under the ICA.

In this case, an ICC determination that the filed rates are not "reasonable" likely will have little or no practical effect if rendered after petitioners have paid the filed rate because respondent CME is insolvent. Even if the ICC subsequently determines that the filed rates are unreasonably high, petitioners would be forced to stand in line as unsecured creditors of CME in the hope of recovering some (probably small) percentage of the reparations that they would lawfully be due. This outcome nullifies entirely the ICC's law-making authority with respect to rates in violation of the primary jurisdiction doctrine. To satisfy this doctrine, the ICC must have an opportunity to determine the reasonableness of the filed

rates *before* petitioners are required to pay respondents the filed rate.[9]

B. This Court's Holdings Require Courts To Stay An Undercharge Proceeding Against A Shipper And To Refer The Question Of Rate Reasonableness To The ICC Where, As Here, The Shipper Does Not Have An Opportunity To Be Made Whole After A Later Civil Action For Reparations.

1. This Court has made plain that carriers have no legal right to collect rates that are unreasonable. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 204 (1960). Indeed, such rates, while technically "legal," are not "lawful." *Arizona Grocery*, 284 U.S. at 384. Accordingly, where carriers sue for undercharges, they should not automatically be entitled to collect the filed rate. Instead, shippers should be permitted to raise the reasonableness of the filed rate as a defense. In that event, the "established judicial reference procedures under which the Commission would be called upon to aid the court" in determining the reasonableness of the rates should be followed. See H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931.[10]

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[9] The rationale for referral is particularly strong in actions for additional monies in which, in addition to disagreeing over the reasonableness of rates, the parties disagree over which tariffs apply in the first place. In such cases, it is inappropriate to require shippers to pay the rates demanded instead of referring the tariff applicability and rate reasonableness disputes to the ICC.

[10] In an ordinary reparations action, a shipper institutes a civil suit against a carrier, which is liable, under the Act, "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. §§ 11705(b)(3), 11706(c)(2). To reconcile the requirement that carriers pay reparations for rates that the *Commission* finds unreasonable with the requirement that reparations be recovered in a civil suit, Congress indicated that courts should follow the "established" referral procedure. *See* H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931. Congress provided shippers with this reparations remedy to overrule legislatively this Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). *See id.*

While this outcome appears to follow inexorably from the language of the statute, from the primary jurisdiction doctrine, and from considerations of judicial and regulatory economy, this Court has never squarely decided the broader question. Nor must the Court decide here whether courts should stay *all* undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties. This Court, however, on a number of occasions, has either approved of or strongly suggested that courts should follow the former procedure. See, *e.g.*, *Pennsylvania R.R.*, 363 U.S. at 203 (in an undercharge action against the Government, "the Court of Claims [properly] suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates"); *Western Pacific*, 352 U.S. at 64 ("in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views"); *United States* v. *Chesapeake & Ohio R.R.*, 352 U.S. 77, 81 (1956) (same); *In re Penn Cent. Transp. Co.*, 447 F.2d 841, 844 (3d Cir.), *aff'd sub nom. United States Steel Corp.* v. *Trustees of Penn Cent. Transp. Co.*, 414 U.S. 885 (1973) (describing rate unreasonableness as a legitimate defense).[11]

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[11] *See also Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 223 (1966) (action under Shipping Act must be stayed while issues within jurisdiction of Federal Maritime Commission may be determined by that Commission); *General Am. Tank Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared in the course of the litigation that an administrative problem, committed to the [Interstate Commerce] Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act"); *Chicago & N.W. R.R.* v. *Lindell*, 281 U.S. 14, 17 (1930) (allowing counterclaim to carrier's collection action on basis of judicial economy and fact that allowing defense was equivalent of offsetting one judgment against another).

With the exception of the court below, each court of appeals to address this issue, including the Fifth Circuit which stood apart from most other circuits on the issue decided in *Maislin*, has followed these decisions, at least where, as in this case, the carrier is bankrupt. *See Milne Truck Lines, Inc.* v. *Makita U.S.A., Inc.*, No. 91-55059, 1992 WL 152140, at *6 (9th Cir. July 7, 1992); *Advance United Expressways, Inc.* v. *Eastman Kodak*, No. 91-1320, 1992 WL 142813, at *4 (5th Cir. June 26, 1992); *Atlantis Express, Inc.* v. *Standard Transp. Servs., Inc.*, 955 F.2d 529, 536 (8th Cir. 1992); *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 355-58 (2d Cir. 1991); *Rebel Motor Freight, Inc.* v. *ICC*, No. 89-3886, 1991 WL 88354, at *3 (6th Cir. May 28, 1991); *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-07, *withdrawn in part*, 1990 U.S. App. LEXIS 13339 (1st Cir. 1990); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-32 (7th Cir. 1982).

On several other occasions, however, in cases not at all like this one, this Court has suggested that shippers sued for undercharges should pay first and then seek reparations in separate actions. In *Pennsylvania R.R.* v. *International Coal*, 230 U.S. 184, 197 (1913), for example, this Court stated, without further analysis, that "[i]f, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay . . . leaving . . . to the [shipper] the right to apply to the Commission for reparation." Likewise, in *Arizona Grocery*, 284 U.S. at 384, this Court stated, after distinguishing "legal" from "lawful" rates, that "the shipper was bound to pay the legal [filed] rate; but if he could show that it was unreasonable he might recover reparation."

These cases do not establish a pay-first rule. To the contrary, these were both cases in which the carrier billed and collected the filed rate. They were not cases, like this one, in which the carrier billed and collected a rate other than the filed rate and then, after the passage of time, alleged undercharges. Thus, these dicta do no more than indicate that the carrier has a legal (as well as practical) right to demand payment of the filed rate at the time of delivery.

Moreover, these were cases in which the outcome of the dispute between the carrier and the shipper did not turn on which procedure for resolving the dispute was followed. They were, more specifically, cases—unlike this one—in which the carriers were intact, ongoing entities, fully capable of repaying the shippers if the ICC later determined that the tariff rates were in fact unreasonable.

The limited applicability of the pay-first dicta is underscored by this Court's decision in *Crancer* v. *Lowden*, 315 U.S. 631 (1942). In that case, decided after *International Coal* and *Arizona Grocery*, the Court strongly suggested that the pay-first approach was not a rule required by the staute, but was instead nothing more than an equitable principle, applicable where the carrier would be materially prejudiced by referral to the ICC and where the shipper could be made whole following a reparations action. Specifically, the *Crancer* Court reasoned that

> [i]f the trial judge had, in the exercise of his discretion, continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the *carrier* to produce the witnesses who had made the inspection of the shipments. On the other hand, the [*shipper*] suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If [the shippers] pay the judgment in this case, and the Commission should, in the [proceeding before it], decide to modify the tariffs, [the shippers] can obtain a *complete remedy* by way of reparation.

Id. at 636 (emphases added).

Although, as these cases demonstrate, this Court has not resolved the question whether courts must refer the issue of reasonableness to the ICC in *all* undercharge actions, it has made abundantly clear that courts must follow this procedure in any situation—unlike the one in *Crancer*—where a shipper may *not* have an opportunity to obtain a "complete remedy" through a separate, sequential action

before the ICC.[12] Specifically, this Court has *required* referral where the statute of limitations bars a shipper's reparations action but not a carrier's undercharge action.

In *Western Pacific*, three railroads sued the United States in its capacity as a shipper of certain war materials to recover the difference between the rate actually paid and the tariff rate that the carriers believed applied to the shipments at issue. 352 U.S. at 60. The Government defended against the railroads' action on the closely related grounds that the higher tariff rate that the railroads advocated was inapplicable and, in any event, was unreasonably high. *Id.* at 61. The Court of Claims entered summary judgment for the railroads, holding that they had correctly identified the governing tariff and that the Government was not entitled to have the rate reasonableness question referred to the ICC because the two-year statute of limitations had run on the Government's cause of action against the carriers for reparations. *Id.* at 62.

This Court reversed. It held that the ICC had primary jurisdiction over rates and that the reasonableness question therefore must be referred by the Court of Claims to the ICC. In so doing, this Court made clear that referral to the ICC was required *because* the Government was barred from seeking reparations in a separate action, *i.e. because* the Government did not have an opportunity to obtain a complete remedy after a separate, sequential legal proceeding. Specifically, this Court stated that "we do not think the [ICA] operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. . . . *Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges*

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[12] The Court also has emphasized that court review of ICC proceedings should be structured to favor parties—whether shippers or carriers—who cannot obtain a complete remedy in a subsequent reparations action. *See Burlington N., Inc.* v. *United States*, 459 U.S. 131, 140-42 (1982); *Atchison, T. & S. F. R.R.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820 (1973).

with impunity. . . ." *Id.* at 71 (emphasis added)."[13]

In this case, as in *Western Pacific*, petitioners would have no opportunity to obtain a complete remedy after a separate, sequential action for reparations. If they are required to pay the filed rate to respondents, and the ICC subsequently determines that the filed rate was unreasonably high, petitioners, as unsecured creditors of respondent CME, will have little or no opportunity to collect full reparations. *Western Pacific* and its progeny, and, arguably, *Cruzcor*, thus require that the district court in this case stay its proceedings and refer the issue of rate reasonableness to the ICC rather than enter judgment against petitioners and require them to seek partial reparations in a separate action.

2. It is particularly appropriate that the reasonableness of the tariff rates be referred to the ICC in this case because the *ICC* has determined that, in cases where the carrier is insolvent, the statutory scheme is best furthered if shippers have an opportunity to adjudicate the reasonableness issue prior to judgment, and that a post-judgment opportunity to seek reparations is not an adequate remedy. *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement* ("*Rate Reasonableness Statement*"), 8 I.C.C.2d 67, 67 (1991). Under this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), the courts must defer to the ICC's choice of the appropriate means of enforcing the statute.

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[13] *See also United States* v. *Chesapeake & Ohio Ry.*, 352 U.S. 77, 81 (1956) (following *Western Pacific*); *Atlantic Express, Inc.*, 955 F.2d at 536 (recognizing rate reasonableness as defense at least in "those situations where the parties agreed to a negotiated rate and the shipper (or broker) no longer has an adequate reparations remedy at the time it is billed for the undercharges"); *Dutko*, 938 F.2d at 357 ("Whatever the force of the filed rate doctrine and whether or not a shipper must normally pay before challenging the reasonableness of a rate, we think the doctrine need not be applied so strictly as to permit a carrier to delay billing beyond the two-year period of limitations").

In *American Trucking*, this Court held that the Commission has discretionary power to fashion a remedy beyond its express authority in order to further a legitimate statutory purpose if two predicates are satisfied: "[F]irst, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *Id.* at 367. In this case, the Commission is clearly seeking to further a "specific statutory mandate"; indeed, it is seeking to further the *core* mandate of the Act that rates charged and collected must be "reasonable." Moreover, the ICC's choice of the most appropriate means of enforcing the statute—affording the shippers the opportunity to challenge the reasonableness of rates at a time when a determination by the Commission will have some practical import—is unquestionably "directly and closely tied to that mandate." Accordingly, this Court's holding in *American Trucking* directly supports the referral petitioners request because it is the ICC's preferred mechanism for enforcing the statute, and this judgment is entitled to respect by this Court.

In sum, the holdings of this Court in *Western Pacific* and *American Trucking* directly control the proper outcome of this case. They require consideration and disposition of a rate reasonableness defense in the same action in which an undercharge claim is asserted. This, in turn, requires referral to the ICC.

C. Sound Policy Considerations Embodied In The ICA Support The Referral Rule.

The rule requiring trial courts to stay undercharge actions by insolvent carriers and refer the issue of reasonableness to the ICC advances the ICA's fundamental rate reasonableness objective without defeating the filed rate requirement. In contrast, requiring shippers to pay first and seek reparations in a separate action defeats the requirement that rates must be "reasonable" and creates a windfall for the estates of bankrupt carriers by allowing them to collect and retain rates that later may be found to be unreasonable.

The referral rule strikes an appropriate balance between the two central provisions of the ICA. It clearly advances the statutory requirement that rates be "reasonable": by providing the ICC—the administrative body charged with determining the reasonableness of rates—with a meaningful opportunity to determine the reasonableness of disputed rates, it assures ultimately that shippers do not pay, and carriers do not collect, rates that are not "reasonable" when that issue properly is raised by a shipper. At the same time, this rule advances the requirement that shippers pay filed rates: in the end, shippers must pay the filed rates, rather than the negotiated rates, if the filed rates are determined to be "reasonable" within the meaning of the statute. There is no question in this case that respondent CME will be paid the filed rate if the Commission determines that the filed rate applicable to petitioners is "reasonable." Moreover, CME is entitled to prejudgment interest in the event that the unpaid charges are found to be reasonable. *Chesapeake & Ohio Ry.* v. *United States Steel Corp.*, 878 F.2d 686, 692 (3d Cir. 1989); *Fawley Motor Lines, Inc.* v. *Cavalier Poultry Corp.*, 235 F.2d 416, 419 (4th Cir. 1956).

Payment of the filed rate, of course, will be delayed under the referral rule. Where the carrier is insolvent, however, delay does not undermine the purposes of the filed rate requirement. See *supra* pp. 12-13. It cannot possibly lead to discrimination against shippers; the negotiated rates were paid long ago, and any discrimination that may be reflected in these rates cannot be cured by requiring shippers to pay higher rates which have never been reviewed by the Commission. Moreover, in the bankruptcy context, delays in the payment of the filed rates do not interfere with carriers' timely collection of their charges. Insolvent carriers—precisely because they are no longer operating—do not require a constant and predictable cash flow to preserve their solvency. *Rate Reasonableness Statement*, 8 I.C.C.2d at 68.

Moreover, this Court should not be concerned with delays resulting from "unreasonableness" defenses that

lack merit. Courts have the power to sanction litigants that raise meritless claims, Fed. R. Civ. P. 11, and the ICC has the authority to dismiss meritless claims referred to it. In any event, referring courts cannot require a threshold showing of merit without infringing upon the ICC's primary jurisdiction to determine rate reasonableness questions in their entirety. And if courts were to establish such a threshold requirement, parties would likely waste time and resources litigating over the threshold requirement that would be better expended in resolving the reasonableness issue itself. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . .").

In contrast to the referral rule, a pay-first approach, when applied in the bankruptcy context, upsets the statutory balance, creates perverse incentives for carriers, and is extremely inequitable. First, it elevates the filed rate requirement to an unwarranted position of superiority over the reasonableness requirement. Indeed, by ignoring the fact that a judgment favoring a shipper in a reparations action would, as a practical matter, be unenforceable, it entirely guts the statutory reasonableness requirement. Unless shippers can obtain complete relief, they will be required to pay an unreasonable rate in flat violation of 49 U.S.C. § 10701(a). Nothing else in the statute or anything in this Court's decisions under the statute supports this result.

Moreover, because a reparations judgment would be unenforceable, a pay-first rule effectively nullifies the reparations provisions of 49 U.S.C. §§ 11705 and 11706, which expressly authorize shippers to seek reparations *and* make carriers liable for these damages. See *supra* n. 10. Of course, if shippers were unsecured creditors of bankrupt carriers, they would have no right fully to enforce reparations judgments against carriers. As a general rule, however, the shippers in cases such as this are *not* creditors of the carriers, and they should not arbitrarily be converted to that status.

It is entirely fanciful to argue, as the court of appeals did in this case, that the shippers are no worse off by paying first than if they had simply paid the tariff rates in the first instance. Pet. App. 10a. The tariff rates, which were often as much as 100% higher than the negotiated rates, were far too high to move traffic in the competitive market in which they would have been charged, and thus those rates *never would have moved traffic* in the first instance. If, for example, respondent CME had billed petitioners for the full undiscounted class rate in the first instance, petitioners would have immediately ceased using respondent and patronized another carrier which offered market rates.

Second, requiring shippers to pay first creates a perverse incentive for carriers *not* to file rates. Under this approach, if the carriers fail to file rates, they can, if they choose, take a second bite at the apple. If they lose in their subsequent undercharge action, they are no worse off than if they had filed the negotiated rates in the first place; if, on the other hand, they win—or if they induce shippers to settle—they can collect rates far higher than they ever would have received in the marketplace.

Finally, the pay-first approach is extremely inequitable. Carriers have no right to retain any more than the lawful rate. Yet, under this approach, carriers that violate—even knowingly or fraudulently—*their* statutory obligation to file negotiated rates, can recover unlawful rates and never be required fully to disgorge their unlawful profits.[14] Shippers, by contrast, who are *not* statutorily responsible for filing rates, and who in fact cannot file rates, would be required to pay unlawful rates without any possibility of subsequent recovery.

The ICA was designed to regulate carriers, and the Act properly places responsibility for tariff compliance on carriers. Requiring shippers to pay first ignores this

[14] In this case, for example, respondent CME led petitioners to believe that it had filed the negotiated rates. Pet. App. 32a-33a; 92a-93a.

fundamental statutory premise, nullifies the statute's "reasonableness" and reparations provisions, creates perverse incentives for carriers not to file rates, and provides violators of the statute with an opportunity to collect windfall profits. Accordingly, rate reasonableness should be a defense to respondents' undercharge claims in this case.

D. Nothing In Bankruptcy Law Requires The Court To Ignore The ICA And To Reject The Reasonableness Defense And The Immediate Referral Rule.

No specific provision of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, controls this case. Nevertheless, contrary to the suggestion of the court of appeals, the Code, and the common law principles of bankruptcy underlying the Code, fully support the argument that a shipper must be permitted to defend against an undercharge claim on the ground that the filed rates were unreasonable and have that defense referred to the ICC.

First, it is axiomatic that the rules of bankruptcy must not be interpreted to permit "creat[ion of] a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). See also *In re Midwest Serv. & Supply Co.*, 44 B.R. 262, 265 (D. Utah 1983) (debtor "may not assert the automatic stay as a weapon to obtain the benefits" of a transaction and "simultaneously prevent the [creditor] from netting out . . . the recoupment . . ."). In this case, respondent CME, if it had remained solvent, would not be permitted under the ICA to retain the filed rate if the ICC determined, in the context of a reparations action by petitioners, that the filed rate was not "reasonable." Yet CME, precisely because it is insolvent, will be permitted to collect *and retain* the filed rate if the pay-first procedure is followed in this case. Respondents will, in other words, "merely by reason of the happenstance of bankruptcy" be permitted to create precisely the sort of "windfall" that the Code forbids. Only by adjudicating the rate reasonableness issue before judg-

ment is entered against petitioners can the serious risk of a windfall be eliminated.

Second, the Bankruptcy Code does *not* embrace a rule of increasing the pool of money available to creditors at all costs. As a general matter, the Code does require an entity that owes a debt to the bankruptcy estate to pay that debt on demand. 11 U.S.C. § 542(b). The Code expressly recognizes, however, that this general "turnover" rule does *not* govern cases in which the entity that owes the estate has a countervailing claim or defense against the estate arising out of the same or a different transaction. Specifically, when claims arise out of the same transaction, a creditor that is also a debtor of an estate is entitled to raise the defense of recoupment against any claim by the estate. See, *e.g.*, *In re B & L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986); *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864, 869 (3d Cir. 1944).[15] Similarly, when the claims arise from separate transactions, Section 553 of the Code provides that bankruptcy "does not affect the right of a creditor to offset a mutual debt owing by such creditor to the debtor . . . against a claim of such creditor against the debtor . . . ." 11 U.S.C. § 553(a).

Thus, an entity that is both a debtor and a creditor of the bankruptcy estate is *not* required to pay first and collect later. To the contrary, it is entitled to set off the debt it owes against the debt it is owed (or to recoup any amount it is owed), and to pay only the balance due. See, *e.g.*, *In re Bevill, Bresler & Schulman Asset Management Corp.*, 896 F.2d 54, 57 (3d Cir. 1990); *United States* v. *Brunner*, 282 F.2d 535, 537 (10th Cir. 1960); *Prudential Ins. Co.* v. *Nelson*, 101 F.2d 441, 443 (6th Cir.) ("it is only the balance which is the real and just sum owing by or to the bankrupt"), *cert. denied*, 308 U.S. 583 (1939).[16]

[15] Recoupment is an equitable doctrine applied by bankruptcy courts to prevent "unjust enrichment." *In re B & L Oil Co.*, 782 F.2d 155, 159 (10th Cir. 1986). "Under recoupment, a [creditor can] meet a [debtor's] claim with a countervailing claim that arose 'out of the same transaction.'" *Id.* at 157. The availability of the recoupment defense follows from the fundamental principle of bankruptcy law that a debtor's claim remains subject to otherwise available defenses. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5868; H. Rep. No. 595, 95th Cong., 2d Sess. 367-68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6323-24.

This Court has long recognized that the rule permitting recoupment and setoffs is both logical and fair. More than 75 years ago the Court noted that the right to set off mutual claims

> is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, *to avoid a circuity of action*, may interpose his mutual claim by way of defense . . . .

Studley v. *Boylston Bank*, 229 U.S. 523, 528 (1913) (emphasis added). "Such counterclaims," the Court continued, "can be asserted as a defense or by the voluntary act of the parties, *because it is grounded in the absurdity of making A pay B when B owes A.*" *Id.* (emphasis added).[17]

[16] Indeed, the clear weight of authority holds that a claimant that is both a debtor and creditor of a bankruptcy estate is entitled under Section 553 to assert a prepetition claim against the estate as a defensive setoff even where the estate's debt has been discharged, *i.e.*, even where the claimant has no legal right otherwise to collect the debt it is owed by the estate. *See, e.g., In re DeLaurentiis Entertainment Group, Inc.*, 3 Bankr. L. Rep. (CCH) ¶ 74,569, at 78,474 (9th Cir. 1992); *In re Davidovich*, 901 F.2d 1533, 1539 (10th Cir. 1990); *In re Morgan*, 77 B.R. 81, 84-85 (Bankr. S.D. Miss. 1987).

[17] *See also In re Anchorage Int'l Inn, Inc.*, 16 B.R. 308, 313 (Bankr. D. Alaska 1981) ("The rules of setoff were created to remedy the unfairness perceived in requiring a creditor to pay his debts in full to the bankrupt, while granting the creditor only a percentage of debts owed him by the bankrupt"); W. Norton, *Norton Bankruptcy Law and Practice*, § 33.01 (1981) ("In the absence of a recognition of the right to a setoff, the creditor might be forced to pay in full the amount owed to the debtor, but be limited to no more than a pro rata recovery of his claim against

In sum, it is antithetical to the Bankruptcy Code to permit an entity seeking refuge in the Code to obtain a windfall from its creditors. Thus, the Code has long recognized the "absurdity" of forcing a creditor that is also a debtor to pay in full and be repaid only in part. Accordingly, to the extent bankruptcy law is relevant to this case, its principles support allowing the reasonableness issue to be decided as a defense to this action and to have the matter referred to the ICC.

* * * *

The core requirement of the Interstate Commerce Act is that carriers must charge rates that are "reasonable." For this reason, shippers must be permitted to defend against claims for payment of the filed rate on the ground that the filed rate was not "reasonable" in situations where the carrier billed and collected a lower rate at the time of the shipment. This defense must be referred to the ICC, which has primary jurisdiction to determine the reasonableness of rates. At a minimum, shippers must have the opportunity to have the reasonableness issue referred to the ICC in cases in which they will not have an opportunity to obtain a complete remedy from the carrier after a separate, sequential reparations action. In this case, petitioners paid the amounts billed by respondent CME at the time CME transported petitioners' goods. And, because CME is insolvent, petitioners will be denied their statutory right to pay no more than the "reasonable" rate if they are required to pay the filed rate and the ICC subsequently determines that this rate was not "reasonable." Accordingly, petitioners must be permitted to raise the rate reasonableness defense in this action, and they are entitled to have the reasonableness issue resolved by the ICC in this case and not in a separate reparations action.

CONCLUSION

The judgment of the court of appeals should be reversed.

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the debtor. The process of imposing this loss *on an otherwise innocent party* has historically been thought to be improper") (emphasis added).

Respectfully submitted,

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APPENDIX

Amicus The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting large, medium, and small industrial and commercial enterprises in every state. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for the routing of approximately 80% of the nation's freight.

Amicus The National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The members of this Conference ship primarily via motor common carriers.

Amicus The Health and Personal Care Distribution Conference, Inc. is comprised of approximately 70 companies that manufacture and ship drugs, medicines, and personal care items throughout the nation. The members of this Conference ship primarily via motor common carriers.

Amicus The International Mass Retail Association ("IMRA") represents over 120 mass retail companies, including discount department stores, specialty hardline and softline discounters, warehouse clubs, and other mass retailers. IMRA's members operate more than 40,000 stores in all 50 states, employ more than 1.5 million Americans, and comprise the overwhelming majority of the $170 billion U.S. mass retail industry. IMRA members are major users of common carriers.

Amicus The Rubber Manufacturers Association ("RMA") is a cooperative manufacturing trade association comprised of about 200 rubber manufacturers. Because a high percentage of its members' traffic moves by motor carrier, RMA has been deeply involved in the legislative effort to find a solution to the undercharge problem through its participation in the Coalition for an Under-

charge Relief Bill. To date, RMA's members have received more than 3,000 undercharge claims for over $898,000, with estimates for future claims in excess of $1 billion.

Amicus The Transportation Brokers Conference of America ("TCBA") is a trade association representing approximately 1200 general commodity transportation brokers throughout the country. TBCA's membership ranges from small specialized freight brokers to larger corporate distribution and logistic service providers. The pay-first requirement advocated by respondents would impair, if not preclude, the ability of many, if not all, brokers, to defend meritless claims. Moreover, many brokers would face bankruptcy if they were unable ultimately to recover monies paid to insolvent carriers.

Amicus The Transportation Claims and Prevention Council, Inc. ("TCPC") is a voluntary, not-for-profit organization of approximately 500 firms nationwide. TCPC's primary purpose is to assist its members in managing freight claims functions. While "freight claims" frequently involve disputes between shippers and carriers over lost and damaged cargo, they may also encompass transportation pricing disputes—for example, claims by shippers against carriers for reimbursement of "overcharges," or, as here, undercharge claims by carriers against shippers. TCPC member firms use all modes of freight transportation, including motor common carriers.